Proving Impediments Associated with Performance of the Contractual Obligations during the Spread of COVID-19 by V. Yaremko and Y. Zahoruiko

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Proving Impediments Associated with Performance of the
Contractual Obligations during the Spread of COVID-19

by Volodymyr Yaremko and Yaroslava Zahoruiko

Abstract

At a time when many companies around the world are incurring losses due to the spread of COVID-19 and related government restrictions, which make it difficult to fulfill certain contractual obligations, the trend towards numerous litigation and arbitration cases becomes obvious. Contracts and local laws provide various legal mechanisms to deal with such problems, but in general most require proof that fulfilling specific contractual obligations has become extremely burdensome or impossible. The article analyzes what evidence can help in proving this.

I. Introduction

In light of the exponential spread of COVID-19, the whole world is facing unprecedented economic challenges. They prevent many businesses from performing their contractual obligations or make such performance burdensome.

Pacta sunt servanda is the basic principle of most legal systems stressing the importance and reliability of contracts. In common law, existence of the principle as such is debatable, but there is still a general understanding that contracts must be performed. Nevertheless, both common law and other legal systems contain certain legal mechanisms to deal with the implications of COVID-19 for contracts. The list of available legal mechanisms depends on the terms of the specific underlying contract, as well as the applicable law. For example, the concept of force majeure can usually be applied by default to contractual obligations governed by the laws of the continental legal system, while under English law there must be a relevant contractual provision. In addition to force majeure, there are many other relevant legal mechanisms which can be relied upon, such as the doctrines of hardship, a fundamental change of circumstances, frustration of purpose, impossibility to perform a contract, and others.

1 Volodymyr Yaremko, FCIArb (vyaremko@sk.ua) is a counsel and Yaroslava Zahoruiko (yzahoruiko@sk.ua) is an associate in International Arbitration group at Sayenko Kharenko law firm (Ukraine).
4 E.g., the Civil Code of Ukraine (2003), Art. 617, the Civil Code of Germany (1881), Sec. 206.
8 Ibid., p. 422.
9 Ibid., p. 423.
Legal consequences, as well as requirements to invoke the legal mechanisms, differ from country to country and from contract to contract. Moreover, the situation with the spread of COVID-19 changes continuously, urging governments to either implement more stringent legal and economic measures or cancel them when they are no longer needed. For this reason, even if today all requirements for release from liability based on force majeure are met, tomorrow the performance of the contract may become completely impossible, calling call for other legal mechanisms.

Based on the foregoing, this article aims to analyze what evidence can help to prove existence of the impediments for performance of the contractual obligations, which may become the basis to claim application of respective legal mechanisms dealing with liability for such obligations. The article concerns general principles of evidence in such situations, while each individual contractual obligation shall be checked against the terms of the underlying contract and applicable law in order to decide on the specific list of evidence to be collected and submitted.

II. General Rules of Evidence in International Dispute Resolution

It is commonly recognized that the party making a claim has the burden to prove it.10 That is why a party claiming that it is impossible or burdensome to fulfill a specific contractual obligation must provide relevant evidence.

Due to the principle of pacta sunt servanda and the general approach that confirms the sanctity of contacts, legal mechanisms to release from or modify the liability are considered exceptional. Consequently, in most jurisdictions, the standard of proof required to engage such mechanisms is high enough11 making the task of preparing of utmost importance. This is especially relevant for situations where an amicable solution via negotiations is likely to be achieved, which may create an illusion of contractual safety and underestimating the risks of failure to reach a compromise at the end. If timely preparations are not made, the chances to collect evidence that will meet the required standard of proof will decrease.

Not only applicable law and the wording of contracts matter but also the way they are interpreted and applied. In this context, the rules and practice of local courts and arbitral tribunals come into play.

Local courts tend to apply fairly strict rules regarding the submission and consideration of any evidence being bound by national admissibility of evidence requirements.12 The main reason is that judicial authorities have to follow the local procedural laws, which usually have a detailed regulation of evidence. In most cases, deviation from such rules even by agreement of the parties is not possible. Besides, judicial bodies are often directly or indirectly bound by the precedents of the higher courts, which in practice can significantly modify the legislative

12 E.g., the UK Civil Evidence Act (1995); the French Civil Procedure Code (1806), Art. 9-11; the German Code of Civil Procedure (1881), Sec. 103a, 284, 286.
requirements by interpreting legal norms and contractual provisions.\textsuperscript{13} That is why an advanced in-depth analysis of the relevant case law is important if there is any risk of impediments associated with performance of the contractual obligations.

In arbitral proceedings, the tribunals enjoy quite a wide margin of appreciation for evidence. Procedural rules of all major arbitral institutions remain silent on specific requirements for evidence, only mentioning some general principles. For example, the SCC Arbitration Rules 2017 provide that “the admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine”.\textsuperscript{14} Almost identical provisions can be found in the ICDR International Arbitration Rules.\textsuperscript{15} At the same time, the LCIA Arbitration Rules 2014 authorize arbitral tribunals “to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion”.\textsuperscript{16}

At the same time, the tribunals’ powers with respect to evidence are not unlimited. First of all, they can be limited by the parties. The parties can agree on specific rules of evidence in their arbitration agreement or later in the proceedings.\textsuperscript{17} Moreover, the parties can choose some codified rules of evidence to be binding in their arbitral proceedings. An example of such rules is the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”), which can be used in arbitration either by agreement of the parties or at the initiative of arbitral tribunals.\textsuperscript{18}

The IBA Rules specify that arbitral tribunals “shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

(c) unreasonable burden to produce the requested evidence:


\textsuperscript{17} E.g., VIAC Arbitration and Mediation Rules (2018), <https://www.viac.eu/en/arbitration/content/vienna-rules-2018-online#ConductoftheArbitration> accessed 9 April 2020, Art. 28(1); the SCC Rules, Art. 23 (1).

(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.” (emphasis added).19

Secondly, mandatory provisions of the applicable law can also impose some restrictions on the tribunals’ powers with respect to evidence unless the parties have exercised their autonomy and excluded application of such mandatory law provisions.20 Therefore, if the applicable law says that some circumstances can be confirmed only by specific type of evidence and there is no relevant parties’ agreement, there would be not much room for the arbitral tribunal’s discretion to confirm such circumstances in the absence of the evidence.

Consequently, in arbitration if there are no relevant agreements or mandatory provisions of the applicable law, the rules of evidence are rather flexible leading to the following results. On the one hand, parties can submit any evidence (except for the mandatory requirements of the applicable law). On the other hand, this situation adds to the lack of predictability regarding sufficiency of evidence for applying the force majeure and other legal mechanisms (especially bearing in mind the small amount of publicly available commercial arbitration case law).

In the context of proving impediments associated with performance of the contractual obligations, the general tendency for a higher standard of proof in relation to force majeure and other relevant legal mechanisms should be kept in mind.21 This means that arbitral tribunals are reluctant to establish force majeure or apply such other legal mechanisms, unless a specific impediment to the performance of the contractual obligations is defined in the contract.

III. What to Prove, and How?

Various force majeure as well as other contract and law provisions, which can release from liability or modify it, implicitly or explicitly specify a number of elements to be proven for their successful invocation. For example, Article 79 (1) of the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”) prescribes that “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an

19 Ibid., Art. 9 (2).
impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences” (emphasis added).

National laws contain similar provisions. Under French law “In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor” (emphasis added).22 In the context of the doctrine of frustration Indian law prescribes that “A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful” (emphasis added).23

From the above-cited provisions it can be concluded that relevant contracts and laws say otherwise, in order to invoke legal mechanisms in response to impediments associated with performance of the contractual obligations, the following aspects should be proved:

- existence of the unforeseeable circumstances that make performance of the contractual obligations impossible or burdensome;
- impossibility or burdensome nature of performance of the specific contractual obligation;
- a causal link between the aspects mentioned above.

We would like to emphasize that the above list is cumulative, i.e., if any of its parts is missing, in most cases there will be no available legal mechanism to deal with the contractual obligations. Sometimes there are also other elements to be proven, for example, the timely notification of the counterparty as discussed below.

Proving a causal link is a logical exercise which largely depends on the collected evidence for the existence of the circumstances that make the performance of the contractual obligation impossible or burdensome, and the fact that it would be impossible or burdensome to perform the specific contractual obligation. Establishing a causal link can be rather difficult, moreover so for complex projects: the link shall be proven for each of the contractual obligations, and the overall number of which can be significant.24

Groups of evidence that can help prove the first two aspects are analyzed below. Sometimes, one or more pieces of such evidence can be sufficient. However, since it is difficult to predict how the overall situation will develop, collecting as much evidence as possible can provide flexibility in choosing legal mechanisms and increase the chances of success in court or in arbitration.

i) “Core Evidence”

Wording of the contract, applicable legislation, practice of interpretation by local courts and arbitral tribunals, history of the relationship between contract parties, situation in the region

22 The French Civil Code (1804), Art. 1218.
23 The Indian Contract Act (1872), Sec. 56.
and particularities of the obligation in question are just some of the factors that should be considered while choosing the appropriate “core” evidence. Usually, such “core” evidence can include decisions of the government, expert technical reports, press reports, trade association reports, witness statements, etc. \(^{25}\) Since it is impossible to list all evidence that could be used to prove the impossibility or burdensome nature to perform a contractual obligation, a summary of several important aspects related to the “core” evidence is provided below.

Firstly, since, as mentioned above, most of the legal mechanisms available for those who cannot perform their contractual obligations require to prove the genuine impossibility or extremely burdensome nature of the obligations’ performance. The case law related to the previous epidemics shows that it is not an easy task. For example, in relation to the Ebola epidemic, the Court of Arbitration for Sport held that no force majeure could have been invoked to legitimize the postponement of the African Cup of Nations tournament in 2015, as it was still possible yet difficult to organize it. \(^{26}\) That is why evidence proving the genuine impossibility or extremely burdensome nature of the specific obligations’ performance should be carefully collected.

Secondly, some judges and institutions check whether temporary or permanent impediments to perform the contractual obligations have been properly documented at a company level. This means that companies may be expected to conduct internal investigations to assess the feasibility of performing their contractual obligations. Based on such investigations, companies may issue internal documents concluding that it is impossible or extremely burdensome to perform specific contractual obligations or, more generally, that the company suspends some or all of its operations due to such impediments. As an example, the Ukrainian Chamber of Commerce (“UCC”) requires submission of an internal company document confirming the suspension of the company’s operations to accompany an application for the force majeure certificate related to the spread of COVID-19. \(^{27}\) For arbitral tribunals and courts, such documents may, in some circumstances, indicate that the impediments to perform the obligations have been properly examined by the company.

Thirdly, some laws prescribe that certain circumstances can be proved only by a specific type of evidence. For example, a certificate by a firefighting authority confirms the occurrence of a fire. \(^{28}\) Without such evidence, local courts are unlikely to use force majeure or another legal mechanism to release a claimant from liability to perform a contractual obligation or to modify it. Arbitral tribunals may be more flexible in this regard, but it is still worthwhile to ensure the


\(^{28}\) \textit{E.g.}, the Resolution of the Cabinet of Ministers of Ukraine ‘On approval of the accounting of fire events’ procedure’ (2003).
availability of such evidence. Due to the spread of COVID-19, states may introduce appropriate legislative changes in due course.

Finally, a separate note should be made regarding the witness statements, including statements by employees, suppliers, subcontractors, etc. This type of evidence should be collected as soon as impediments associated with performance of the contractual obligations arise, as over time witnesses may forget some information or it can become problematic to reach them. Even though sometimes in court or in arbitral proceedings it can be expected that witnesses will be available for cross-examination, under some circumstances prepared in advance written statements are sufficient.

ii) “No Alternative” Evidence

Another evidence to be prepared is proof of the lack of alternative means to perform the contractual obligations. This primarily refers to force majeure, but some other legal mechanisms related to impediments for performance of the contractual obligations may also require such proof.

The requirement that there is no alternative is either expressly provided in the force majeure clause (or a similar provision) of the contract or stems from the requirement to prove the impossibility of performing the contractual obligations on a temporarily or a permanent basis. The standard of proof for the absence of alternatives depends on the wording of the contract or legislation and the existing practice of its interpretation: sometimes it is enough to show that reasonable attempts were made to find an alternative way to perform the contractual obligation, while in other cases there should be no feasible alternatives.

In one of the classic English law cases, the Tsakiroglou & Co Ltd v Noblee Thorl GmbH, the closure of the Suez Canal caused the defendant to allege frustration of the contract with the claimant due to the impossibility to deliver nuts from Sudan to Germany. However, it was decided by an arbitrator and later by English courts, that the defendant could choose a different delivery route, even if it was not common. Here, the existence of an alternative way to perform the delivery obligation led to the dismissal of the defendant’s claim.

In the context of the spread of COVID-19, governments may introduce “self-isolation” rules for certain categories of people. Consequently, companies may temporarily lose all or a substantial part of their employees, which may affect the performance of the contractual obligations. In this context the Napier v. Trace Fork Mining Co. case from the Spanish flu times should be mentioned. In that case, the court held that the completion of the construction works was still possible, even though it could have become more expensive because of the staff shortage. With respect to the current pandemic, in Ukraine UCC has already clarified that it does not issue force majeure certificates to confirm the impossibility to perform the contractual obligations due to staff self-isolation. That illustrates that since it is usually possible to hire

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29 E.g., the Civil Code of Ukraine (2003), Art. 617.
or engage other people as substitutes, such government restriction can hardly be considered a force majeure due to the availability of alternative ways to perform the contractual obligations.

“No alternative” evidence may include 1) evidence related to the performance of a specific contractual obligation, 2) evidence that other market participants cannot perform comparable obligations. For the first group, one can collect all kinds of “core” evidence as described above, to prove the impossibility or impediments to perform the contractual obligations.

For the second group, one can collect media reports and publicly available statements from other companies and business associations showing that a specific type of obligation or activity, in general, cannot be performed. Additionally, it may be needed to contact other companies directly and request a written statement confirming that they are experiencing similar impediments to perform the contractual obligations.

iii) Notifications

Notifications to the counterparty as such are not evidence of force majeure events, impossibility or a burdensome nature of performance of the contractual obligations. Nevertheless, the provision of such notifications, as well as collection of evidence thereof, plays a decisive role in attempts to apply force majeure or other legal mechanisms to release or modify liability in the event of impediments related to performance of the contractual obligations.

The notification requirement is often included in contracts and laws. For example, Article 79 (4) of the CISG in the context of its force majeure provision stipulates that the “party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt”.

Similar provisions can be found in national laws. For example, under Lithuanian law “The party who failed to perform a contract shall be obliged to inform the other party about the arising of an impedimental circumstance foreseen in Paragraph 1 of this Article and its influence on the possibility to perform the contract. In the event where the notice is not received by the other party within a reasonable time after the non-performing party became or should have become aware of the impedimental circumstance, he shall be bound to compensate for damages resulting from the non-receipt of the notice”.

Contracts also usually set some requirements for notifications. For example, FIDIC contracts stipulate that a party that is prevented from performing the obligations shall within 14 days notify the counterparty of the “event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented”. Thus, this provision requires notifications to contain the description of the event as well as the specific obligations that cannot be performed.

ICC Force Majeure Clause 2003 provides even more detailed notification requirements: “A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the

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34 E.g., FIDIC Red Book (1999), Art. 19.2.
failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party”.35 Further in the clause it is stated that “Where the effect of the impediment or event invoked is temporary, ... Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual duties”.36 Both short and long forms of the ICC Force Majeure Clause 2020 also maintain the notification requirement.37

Even if notification is not expressly provided for by applicable law or the contract, practice shows that such notification should still be made in each case. It follows from the general principle of good faith and aims to provide the other party with an opportunity to minimize damage caused by non-performance or improper performance of the contractual obligations by the creditor.38 In this context, Ukrainian law can be mentioned. While it does not establish a specific requirement for a notification of force majeure, UCC will not consider applications for force majeure certificates without receiving a copy of such notification.39

What exactly should be notified? Similarly to other issues discussed above, it largely depends on contracts and applicable law. In general, as it can be seen from the above-cited provisions, to secure a better position for arbitration or court proceedings, it is suggested to notify counterparties of the impossibility or any other impediments to perform the contractual obligations and to notify when such impossibility or impediments disappear. The content of notifications should be precise enough to allow the counterparty to take appropriate actions. In particular, it should provide detailed information about each relevant contractual obligation and a brief explanation of the reasons for the impossibility or impediments to perform the contractual obligation.

At the same time, it should be noted that case law related to impediments to the performance of the contractual obligations in light of pandemic situation shows that the notification requirement can be applied flexibly. For example, in one of the US cases related the Spanish flu, the contract provision provided the following notification requirement in its suspension clause: “Notice, with full particulars and the probable term of the continuance of such disability, shall be given to the other party hereto, within ten days of the date of the occurrence of such disability” (emphasis added).40 The court held that the notice was sufficient even though it did not contain full particulars.41

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36 Ibid., Part 6 of the Clause.
38 E.g., The UNIDROIT Principles of International Commercial Contracts (2016), Art. 5.3.
41 Ibid.
It is important not only to notify the counterparty but also to secure sufficient evidence of such notification. Unless the contract provides for a different method, a notification can be sent by email and registered mail. Originals of postal documents must be added to the evidence bundle.

iv) Force Majeure Certificates

Force majeure certificates are issued by trade authorities or associations in a number of countries, e.g. Bulgaria, Ukraine, China, Bosnia and Herzegovina, Czech Republic, Hungary. Their main purpose is to certify factual circumstances that could have prevented the performance of contractual or other obligations. In some situations, they can also be used to prove other impediments related to the performance of the contractual obligations (for example, hardship and fundamental change of circumstances).

The scope of circumstances that can be certified by force majeure certificate depends on the rules and practice of their issuer. Some issuers take a more objective approach, focusing mainly on whether an event occurred that could be qualified as a force majeure under general rules (natural disaster, export ban, state prohibition to conduct a certain activity, etc.), without analyzing in-depth whether it qualifies as such under the specific contract. On the other hand, some issuers of force majeure certificates pay more attention to the analysis of specific contract provisions and the causal relationship between the event in question and the impossibility to perform the contractual obligation.

An example of the first approach is the practice of the China Council for the Promotion of International Trade (“CCPIT”). Since the beginning of February 2020, CCPIT has been issuing numerous force majeure certificates related to state restrictions due to COVID-19. As stated by CCPIT, “The force majeure factual certificate is the proof of objective, factual circumstances, not the ‘trump card’ to exempt from contractual obligations. ... The certificate can prove objective facts such as the delayed resumption of work, traffic control, and limited dispatch of labor personnel” (translated from Chinese).

It should be noted that CCPIT’s approach to force majeure certificates is quite flexible, which may affect their evidentiary value. In this regard, the Jiangsu Flying Dragon Food Machinery v Ukraine CF Mercury Ltd case can be mentioned. In this case, delays in the delivery of goods occurred as the plant, which was supposed to produce the goods, was out of electricity because of heavy rain. CCPIT concluded that no force majeure as such took place, nevertheless, a force majeure certificate was issued. This shows that CCPIT decided to certify the actual problems with fulfillment of the contractual obligation to produce and deliver the goods, but there was no in-depth analysis as to whether such problems can be considered force majeure under the law and the contract.

45 Ibid.
In Ukraine, the body authorized by law to issue force majeure certificates is UCC. When dealing with force majeure applications, UCC focuses on the wording of a specific force majeure clause (if any) or relevant legal requirement, as well as the causal link between the force majeure event and the inability to perform a specific contractual obligation. In the context of the spread of COVID-19, quarantine has been added to the Ukrainian legislative list of force majeure events. This is the reason UCC can issue force majeure certificates due to inability to perform the contractual obligations because of the quarantine rules. In addition, UCC announced the simplification of the application process, requiring less evidence than usual. Nevertheless, UCC is reluctant to issue a certificate unless there is sufficient evidence that a specific obligation cannot be performed.

While the approach of UCC may appear more rigorous than of CCPIT in checking the causal link between force majeure events and specific contractual obligations and legal requirements, the question of the value of a force majeure certificate in international dispute settlement is questionable. It results in the following outcomes.

First, force majeure certificates can be used to help establish some factual circumstances of the force majeure event, but it is up to judges or arbitrators to decide whether the force majeure certificate is generally reliable. There is some practice of treating the certificates as mandatory, but its amount is insignificant. For example, in China some time ago for proving force majeure it was required to submit “evidence issued by the relevant agency” but nowadays submission of such evidence is not mandatory anymore.

In Ukraine, the court practice shows that parties are usually expected to provide a force majeure certificate to substantiate their force majeure claims. In a recent COVID-19-related decision, the local Ukrainian court took into account, inter alia, that the defendant had not submitted a force majeure certificate and held the defendant liable for the non-performance of the obligations. The mentioned decision can still be appealed but it illustrates the general trend in Ukraine. At the same time, there are situations when Ukrainian judges establish force majeure events without force majeure certificates, provided there is other sufficient evidence. For example, in a case concerning force majeure claims because of a cyber-attack, the High Economic Court of Ukraine held that the absence of a force majeure certificate “does not mean the absence of the force majeure event”, satisfied with other evidence presented.

Second, such certificates cannot be conclusive with regard to the existence of a causal link, since the standard of proof for each issuer of force majeure certificates may vary and may differ from that of courts or arbitral tribunals. Finally, force majeure certificates usually do not

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47 UCC, ‘Regulation on certifying force majeure circumstances by the Ukrainian Chamber of Commerce and regional chambers of commerce’ (in Ukrainian) (2014), Art. 6.9.
51 E.g., decision of the High Commercial Court of Ukraine dated 7 December 2016 in the case 904/4470/16.
consider other ways to perform a specific contractual obligation, which is often required by contracts and by applicable law.

Analyzing the value of force majeure certificates, it is worth referring to the analysis carried out by the Privy Council in the *Hoechong Products Co. Ltd v Cargill Hong Kong Ltd* case under Hong Kong law. The judgment stated that the parties and the lower courts were of the opposite opinions what a force majeure certificate should certify: 1) it should certify all conditions for invoking force majeure under the contract (the occurrence of the force majeure event, its interference with the shipment and impossibility to purchase alternative goods); 2) it should certify all conditions except the impossibility to purchase alternative goods; or 3) it should certify only the occurrence of the force majeure event.\(^{54}\)

The Privy Council concluded that CCPIT’s certification of the force majeure event as such was practical and useful, while CCPIT’s certification of the other two conditions (interference of the force majeure event with the performance of the contractual obligation, as well as other ways to perform the obligation) would not have much value. The reason is that to certify the conditions, CCPIT will have to conduct a “semi-judicial investigation, based on information supplied by the [s]ellers and untested by the [b]uyers”, which would be “cumbersome and vulnerable to error”.\(^{55}\) Moreover, it was stated that such matters would, in any case, be considered by courts or arbitral tribunals.\(^{56}\)

To summarize, force majeure certificates are usually not conclusive evidence for invoking force majeure under contracts or applicable law. Their value depends on how they are used and the way they are issued. For example, in many situations, they are sufficient to prove to the other party that the performance of a contractual obligation is problematic, which can help to reach an amicable solution. For courts and arbitral tribunals, the value of the force majeure certificates value largely depends on the reputation of their issuer, the scope of analysis conducted prior to their issuance, and the standard of proof applied by courts and arbitral tribunals.

Regardless of doubts as to the evidentiary value of force majeure certificates, if such a possibility is provided for by the contract or applicable law, providing a force majeure certificates can strengthen the case. Nevertheless, force majeure certificates should always be accompanied by other evidence discussed above.

**IV. Conclusion**

Proving impediments to perform the contractual obligations is a complex process. It usually requires collecting evidence from the moment such impediments arise, notifying the counterpart with securing proof of such service and exploring alternative ways to perform the contractual obligations in question.

The main idea is: 1) to prove certain objective circumstances that cause impediments to perform the contractual obligations, 2) to prove that performance of the contractual obligations has become impossible or extremely burdensome (depending on the pursued legal mechanism),

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\(^{54}\) *Hoechong Products Co. Ltd v Cargill Hong Kong Ltd*, Privy Council, judgment dated 2 February 1995, <https://www.casemine.com/judgement/uk/5b4dc2662e94e07cccd2434d> accessed 9 April 2020, pp. 6-7

\(^{55}\) Ibid. p. 8

\(^{56}\) Ibid.
3) to prove the causal link between the two previous aspects. In the context of the "impossibility to perform" aspect, it may also be required to prove the lack of alternative means to perform the obligation.

Specific standards of proof, as well as the required documents and the necessary steps, largely depend on the applicable law and the general practice of its interpretation. While courts tend to take a more rigorous approach to evidence, arbitral tribunals are more flexible in this regard. Nevertheless, in many cases proving force majeure or applying related legal mechanisms for the release from liability or modification of liability is not an easy task, requiring satisfaction of a high standard of proof. This is why collecting as much evidence as possible is important to increase the chances of success in court or arbitral proceedings.

Broadly speaking, all evidence can be divided into the following groups: "core" evidence, "no alternative" evidence, and force majeure certificates. "Core" evidence is a general group of evidence, the specific set of which is unique to a specific case. It may include all types of documents and other evidence of problems with performance of the contractual obligations.

"No alternative" evidence may be crucial to justify the temporary or permanent impossibility to perform the contractual obligations. To prove the absence of alternatives, one can collect evidence related to the performance of comparable obligations by other market participants.

Force majeure certificates are mainly used to prove force majeure, but they also have a broader use as evidence of problems with performance of various contractual obligations. Their value depends on their issuer, the applicable law, the volume of facts they certify, as well as on the approach of the adjudicators to whom they are presented. The main advantage of force majeure certificates is their certification of a specific objective force majeure event (and not other conditions for invoking force majeure).